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IN THE

Supreme Court of the United States

October Term, 1962.

No. 1104

UNITED STATES OF AMERICA ex rel. L. B. BINION,
Petitioner,

v.

JAMES V. RYAN, United States Marshal for the Eastern District of Pennsylvania,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JAMES V. RYAN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

L. B. Binion, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause on February 18, 1963.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pp. 21-26) is reported at 314 F. 2d 389.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 18, 1963 (Appendix B, *infra*, p. 27), and a timely petition for rehearing was denied on March 18, 1963 (Appendix B, *infra*, p. 28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner was entitled, on application for writ of habeas corpus, to an evidentiary hearing with sworn testimony to prove that no further time remains to be served on his prison sentence and that he should not be returned to prison.

2. Whether the Court of Appeals was correct in ruling against petitioner on the basis of prior proceedings, especially where in two instances the court was relying solely on the denial of a petition for rehearing as the prior decision that precluded consideration of the merits of petitioner's contentions.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The constitutional provisions, statutes, and rules involved are set out in Appendix C (*infra*, pp. 29-31).

STATEMENT OF THE CASE.

Six years ago, petitioner was released from prison pending adjudication of a collateral attack upon his conviction. Despite petitioner's unblemished record as a private citizen during those six years, the Government persists in its efforts to return him to prison for another fifty-six days. Petitioner has been strenuously resisting this attempt to uproot him from his family and normal society. His position rests upon several alternative legal theories that the remaining fifty-six days of his prison sentence have expired. However, the predominant factor ought to be whether simple justice and elementary common sense are to prevail.

Two sentences for income tax violations underlie this case. The first of these, obtained in Nevada, has long since expired. The second, referred to herein as the Texas sentence, was rendered by the District Court for the Western District of Texas. Only this second sentence is involved in this proceeding.

As reflected in the docket entries (1a), the following steps have been taken in the *present* habeas corpus proceeding: the petition for habeas corpus was filed on November 21, 1961 (2a-10a). Respondent answered on December 11 (10a-11a). A traverse to the answer was filed on December 12 (12a). On December 22, 1961, the District Court dismissed the petition, answer and traverse (43a) without a hearing. On February 18, 1963, the Court of Appeals for the Third Circuit affirmed. Appendix A, *infra*.

We turn now to the facts alleged in the petition for habeas corpus.

On September 3, 1952, petitioner pleaded *nolo contendere* to an indictment found in the District of Nevada alleging a violation for the year 1949 of § 145(b), I. R. C. 1939. The sentence was a fine, which was paid, and proba-

tion, for a period of five years. The condition of the probation was that petitioner should report every 60 days to the federal probation officer. There was never any violation of this probation (3a). This sentence has expired.

Thereafter, on December 14, 1953, petitioner pleaded guilty to two indictments, found in the Western District of Texas, alleging violations for the years 1947 and 1948 of § 145(b), I.R.C. 1939. The sentence was a fine, which was paid, and concurrent sentences of five years' imprisonment, to be followed by three years of probation. Petitioner was immediately committed and was received at the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953 (2a).

Following the decision in *Berra v. United States*, 351 U. S. 131, 133, where both parties agreed that § 3616(a), I. R. C. 1939, applied to income tax returns, petitioner in August 1956 moved under 28 U. S. C. § 2255 to correct his Texas sentence on the ground that it was excessive under § 3616(a). This motion being denied, and bail pending appeal being denied by two courts, petitioner applied to this Court for bail, which was granted over the Government's objection (352 U. S. 1028).

On March 19, 1957, petitioner was released from prison (2a). On that date, he had three months and 20 days left to serve (2a).

Subsequently this Court held in *Achilli v. United States*, 353 U. S. 373, that § 3616(a) did not apply to income tax cases. Thereafter, the Fifth Circuit affirmed the denial of petitioner's motion to correct his sentence. *Binion v. United States*, 245 F. 2d 466, cert. denied, 355 U. S. 834 (October 14, 1957). Promptly thereafter, on October 16, petitioner surrendered to the United States Marshal in Philadelphia, Pa. (3a). He was in custody two days.

Immediately following, petitioner brought habeas corpus in the Eastern District of Pennsylvania. The District Court (Welsh, *D. J.*) issued the writ on the following day after preliminary hearing, and released petitioner on

bail, after writing a comprehensive opinion discharging petitioner from custody (4a).

From March 21, 1957, two days after his release from Leavenworth, until October 23, 1957, five days after his release from the custody of the United States Marshal at Philadelphia by order of Judge Welsh, petitioner reported to Mr. Hubert A. Boyd, the Chief U. S. Probation Officer in Las Vegas, Nevada, who, in addition to requiring him to report every 60 days under the terms of his 1952 Nevada sentence (3a), also required petitioner to report on his Texas sentence by personal contact not less than once a week during this period in the same manner as persons on parole or conditional release are supervised (3a). Petitioner reported faithfully and conscientiously throughout, just as any parolee or conditional releasee (3a).

Petitioner's Claim: First Part.

On September 3, 1957, the five year probationary period imposed by the U. S. District Court for Nevada ended (3a). Petitioner's first claim relates to the period between March 21 and September 3, 1957. During those months, petition should have been under no restraint whatsoever inasmuch as he had been released on bail by this Court. Nonetheless, petitioner was under restraint and was required to report to the Probation Officer on twenty-four separate days. Petitioner has been denied the opportunity in the District Court below to introduce any evidence characterizing the restraints during this period. All petitioner seeks in this Court, as to this part of his claim, is the right to a hearing on this issue in the court below.

In the 1957 habeas corpus proceeding, the District Court for the Eastern District of Pennsylvania granted petitioner credit for the entire time between March 21 and September 3, saying:

> "The heart of the matter is that, when relator was released on bond by order of the Supreme Court, he

was under no restraint other than the usual limitation of action imposed on one released on bail. But the Nevada Probation Officer required relator to report in the same manner as a parolee from March 19, 1957, to October 23, 1957, a period far greater than the three months and eighteen days remaining to be served under his sentence. Since reporting on parole is an ameliorated imprisonment, unless other factors in this case affect our judgment, we believe that relator earned confinement time during that period, and is now entitled to his release.".

The Court of Appeals for the Third Circuit subsequently modified the District Court's order to permit petitioner credit only for the time *after* the probation sentence expired on September 3. 273 F. 2d 495. No credit was permitted for the period between March 21 and September 3. Certiorari was denied 363 U. S. 812.

Whereas in the former proceeding petitioner claimed and was denied credit for the five and one-half months between March 21 and September 3, in this proceeding all that is claimed are the twenty-four specific days on which actual restraints were imposed upon petitioner by the probation officer.

Petitioner seeks at the outset only the opportunity in the District Court to introduce evidence concerning the nature of the restraints imposed. No hearing was held to determine these facts by sworn testimony as now alleged in his habeas corpus petition. The Government repeatedly has characterized these restraints as inconsequential. The actual facts ought to be brought to light in an evidentiary hearing in the proper forum.

Petitioner's Claim: Second Part.

When the District Court for the Eastern District of Pennsylvania determined in 1958 that petitioner was entitled to his freedom, a formal order of release was entered

on December 22, 1958 (4a). As already indicated, the decision of the District Court was subsequently modified by the Court of Appeals so that only part of petitioner's sentence was deemed served. The appeal by the Government from the District Court decision was not noted until February 19, 1959 (4a). This part of petitioner's claim in this proceeding is for credit for the fifty-eight days that elapsed between December 22, 1958, and February 19, 1959.

The issue to be determined is what was petitioner's status with respect to his sentence during this fifty-eight day period. It is clear certainly that the Texas sentence had not then expired. The sentence was for a period of five years. The only portion that had expired, according to the District Court decision, was the portion to be served in prison. Well over one year remained on the full sentence. Petitioner claims that the sentence was running between December 22, 1958, and February 19, 1959.

Nothing was done to suspend the running of sentence during this period. The Government did not ask either the District Court or the Court of Appeals for a stay of the judgment. Petitioner certainly did nothing to prevent the sentence from continuing to run.[1] In the absence of some action to suspend the sentence, such as escape from custody, the principle must stand that a sentence continues to run.

Petitioner alleges in the application for habeas corpus that he was not permitted to report to the probation officer during this fifty-eight day period (Par. X) (4a). Had petitioner been permitted to report to the probation officer following his release by the District Court, no one could maintain that he is not entitled to credit toward his sentence. The fact that he did not suffer actual restraint is

1. Compare Rule 38(a)(2) of the Rules of Criminal Procedure: "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail."

attributable entirely to the actions of Government officials. The relevant facts must be established by a hearing in the appropriate forum. Petitioner has been denied the right to such a hearing.

The Court of Appeals for the Third Circuit rejected this claim on a patently spurious analysis that needs a brief additional set of facts. This issue had been raised before the Third Circuit in the previous habeas corpus proceeding in the petition for rehearing, after the Circuit Court had modified the decree ordering petitioner's discharge. The facts relevant to this fifty-eight day period having occurred after the District Court had acted, they could not affect the merits of the issue on that appeal. Petitioner, appellee there, raised the issue for the first time, after the Court of Appeals' decision, to urge that reversal of the District Court order was a futile act because of the intervening events. Since the Court of Appeals denied rehearing, it *may* have rejected this argument. It cannot be said, as the Third Circuit now says, that this action foreclosed the matter. The denial of rehearing could have rested on several factors other than a determination of the merits of the claim for credit. Even if the merits were reached, there had not been full and rounded consideration of the question. The rationale of the Third Circuit therefore is untenable.

In addition, it must be noted, the petition for rehearing did not bring forth the fact that petitioner was not permitted to report on his sentence during the fifty-eight day period. This important added dimension clearly presents a new issue.

The same reasoning is applicable to a Ninth Circuit decision that rejected petitioner's claim for credit. 292 F. 2d 494. Moreover, the Ninth Circuit relied entirely upon a distinguishable case, *Patterson v. Jones*, 141 F. 2d 319 (9th Cir. 1944).

Petitioner's Claim: Third Part.

Certiorari to review the decision of the Court of Appeals for the Third Circuit was denied by this Court on June 6, 1960, 363 U. S. 812. Since no mandate issues from this Court by order, promptly thereafter, on Friday, June 10, 1960, petitioner offered to surrender to the United States Marshal for the District of Nevada (5a). The Marshal refused to take petitioner into custody and persisted in that refusal despite continuing effort to surrender. Finally, on July 12, 1960, petitioner's offer to surrender was accepted. Thirty-two days had elapsed from the time he first attempted to surrender.

The Government has tried to excuse the action of the Marshal on the ground that he lacked knowledge of the legal effect of this Court's denial of certiorari. This line of argument was effective in misleading the Ninth Circuit into concluding that the only information the Marshal had concerning the denial of certiorari was the statement of petitioner. 282 F. 2d at 497-498. This is a demonstrable misstatement of fact and the present petition for habeas corpus alleges that "the Marshal for the District of Nevada, the then counsel for the Government and Mr. LaVallee of Bureau of Prisons had official notice of the denial of petitioner's application for writ of certiorari (363 U. S. 812) promptly after June 6, 1960, and it was not true that they had only petitioner's word" (6a).

The actual motives of the Government officials in question are thus put squarely in issue. Their refusal to accept petitioner's offer to surrender manifestly prejudiced him to the extent of losing the thirty-two days. During that time, petitioner was not permitted to report on his sentence. The application for habeas corpus so alleges (5a). The Government thus placed petitioner in the same legal limbo in which he dangled for fifty-eight days previously. This is a more than sufficient response to the Third Circuit's unwarranted and unsupported speculation that petitioner was not harmed by the Marshal's action.

Petitioner seeks to have a hearing in the court below to develop the reasons for the action of the Government officials concerned. Petitioner was undertaking to set the depositions of the relevant officials at the time of the District Court's summary dismissal of the application for habeas corpus. See Motion to Vacate Order, to Receive Evidence and to Hear Argument, together with Exhibit A thereto (14a-19a). A factual hearing should be permitted to establish the reasons for the refusal to take petitioner into custody.

Summary.

As already indicated, when petitioner was released on bail by this Court more than six years ago, he had three months and 26 days of 180 days to serve prior to mandatory release date. The Government repeatedly asserts that the time was seven days longer. Their error, which they adamantly refuse to correct, apparently lies in failure to credit petitioner with time served in custody prior to his arrival at the penitentiary. Four days have been spent in custody since petitioner was released in 1957, thus reducing the balance to 106 days.

Fifty days credit was allowed by the Third Circuit in its decision in 1959. This credit was for restraint imposed upon petitioner by the probation officer between September 5 and October 25, 1957. While the Government challenged this credit in the subsequent Ninth Circuit proceedings, in the court below it finally conceded that the issue was settled by the Third Circuit's decision. Thus, apart from the Government's wholly inexplicable error on when the petitioner commenced service of his sentence, the Government now concedes that no more than fifty-six days remain to be served.

The claims advanced in this proceeding alternatively meet this fifty-six days. The second part of petitioner's claim, to the fifty-eight days prior to the Government noting its appeal, is sufficient of itself to bring petitioner past the mandatory release date. The first and third parts together total the necessary fifty-six days.

REASONS FOR GRANTING WRIT.

1. Petitioner asks a summary reversal on the primary question presented: whether he is entitled to a hearing on the issues of fact raised by his application for the writ of habeas corpus.

Despite the fact that petitioner has been out of prison for more than six years and the further fact that this is the third federal habeas corpus proceeding in that time, there has not been an evidentiary hearing to determine the new facts that underlie his claim to freedom. On each of the three claims advanced by petitioner there are important unresolved questions of fact.

Thus, on the first part of his claim, concerning the twenty-four days of actual reporting by petitioner to the probation officer in 1957, the Government has made repeated assertions to the effect that little or no restraint was actually imposed upon petitioner. In its last brief, for example, in the Court of Appeals for the Third Circuit, the Government asserted:

> "[. . .] these contacts, a good many of which were by telephone, apparently consisted of little more than informing the probation officer as to his whereabouts." Brief for Appellee, p. 14 n. 9.

The Government is totally unjustified in making such assertions as to the character of the actual restraint involved. The weak qualifier "apparently" does not offset the harm. A wholly unlitigated issue of fact is presented, and petitioner is plainly entitled to an evidentiary hearing.

Petitioner contends that he was subjected to inhibiting and confining restraints by the probation officer through the required contacts not effected by the probation officer's "log". The impact was greatest on the twenty-four days of actual reporting. No legal justification exists for the probation officers' conduct inasmuch as petitioner was then free on bail granted by this Court. The Government can

not be permitted to take the position that no prejudice was done to petitioner. That is an obvious issue of fact that must be tried by evidence.

Likewise, on the second part of petitioner's claim, concerning the fifty-eight days after the District Court granted the writ of habeas corpus in 1958, an important issue of fact arises. The Government would like to ignore that time altogether since it is distinctly embarrassing to them to find a legal characterization for this period. To support his contention that the sentence was running during this period, petitioner has alleged that he was not permitted to report to his probation officer. This, too, represents an issue of fact that should be determined.

Furthermore, 18 U. S. C. § 3568 provides that the sentence of imprisonment "shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of said sentence.

> "No sentence shall provide any other method of computing the term."

A sentence of imprisonment is stayed only if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. F. R. Crim. P. Rule 38(a)(2). Indeed if one elects not to commence service he is given no credit for the time he remains in jail. *Baker v. Hunter*, 142 F. 2d 615 (C. A. 10), cert. denied 323 U. S. 740; *United States v. Cortese*, 244 F. 2d 872 (C. A. 2).

Relator having originally elected to commence service and not being on bail after December 23, 1958, the date of the Court's order, the sentence of imprisonment is not stayed but continues to run and relator is entitled to insist on the benefits of this statute. *Bruno v. United States*, 308 U. S. 287 (1939).

The issue is one of obvious importance in the administration of federal criminal laws. Moreover, it is a question of individual liberty, not only to petitioner, but to others like

him. A cardinal principle of criminal law is that once a prisoner's sentence has commenced to run, it continues to run unless there is some valid supervening occurrence.

Finally, on the third part of petitioner's claim, for the thirty-two days of unavailing attempt to surrender following this Court's denial of certiorari in 1960, there are two fact issues of significance. As with the second part, petitioner would underline the ambiguity of the Government's position through the fact that he was not permitted to report to the probation officer. In addition, a crucial dispute has arisen on the reason for the action of the United States Marshal refusing to take petitioner into custody when he offered to surrender. The Government has made unsupported assertions that the Marshal acted out of ignorance of the fact that certiorari had been denied and of the legal significance of such denial, that he had only the word of petitioner and petitioner's counsel on which to rely. Petitioner strongly disagrees. The Marshal was not deterred by ignorance of either fact or law. But this is not the place to try the fact issues.[2]

The appropriate forum is the United States District Court. As the record shows, petitioner was proceeding with diligence to establish the facts *by sworn testimony* as alleged in his application for habeas corpus. Preparation for depositions had been noticed when the District Court entered its summary order of denial without a hearing. On a summary judgment the inferences to be drawn from the underlining facts *must* be viewed in the light most favorable to the petitioner.

In March of this year, this Court laid down extensive rules governing the duty of District Courts to hold hearings in habeas corpus proceedings instituted by persons in State custody. *Townsend v. Sain*, 83 Sup. Ct. 745 (1963). The test there established was this: "Where the facts are in

2. There is the additional question, perhaps, raised by the Court of Appeals, which asserted without any basis in a factual record that petitioner was not harmed by the refusal of the marshal to take him into custody.

dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 757. This Court thus guaranteed to State prisoners a broad and rounded hearing, at least in a Federal court, and a reliable determination of all the relevant facts.

No less is due to one in Federal custody. This Court said in *Walker v. Johnston*, 312 U. S. 275 (1941), that a Federal prisoner cannot be deprived of a hearing by Government denials of facts alleged, even denials supported by affidavits.

> "On a hearing [the applicant] would have the burden of sustaining his allegations by a preponderance of the evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Id.* at 286-87.

This well-recognized principle was reaffirmed recently by this Court in a proceeding arising under 28 U. S. C. § 2255. *Machibroda v. United States*, 368 U. S. 487 (1962). See also *United States v. Hayman*, 342 U. S. 205 (1952); *Sanders v. United States*, 83 Sup. Ct. 1068, 10 L. Ed. 2d 148.

Under this principle petitioner is entitled to a hearing on the substantial issues of fact that are presented.

2. The Court of Appeals for the Third Circuit enunciated an extraordinary doctrine of *res judicata* that is inconsistent with this Court's decision in *Sanders v. United States*, 83 Sup. Ct. 1068, 10 L. Ed. 2d 148. The Court of Appeals decision in this case preceded this Court's decision in *Sanders*, which formulated the basic rules that are to guide the lower courts. The obvious remedy, therefore, is to remand the case to the Third Circuit for reconsideration in light of the principles laid down by this Court.

Each of the three parts of petitioner's claim was rejected by the Court of Appeals on the basis of some prior proceeding. To illustrate, on the claim for fifty-eight days' credit for the period following petitioner's release in 1958 on habeas corpus and before the Government's notice of appeal, the Third Circuit opinion never treats the merits of the issue! Rather, the court below rested its decision entirely on the effect of a prior decision. That prior decision, far from being an adjudication on the merits, was nothing more than a denial of a petition for rehearing in which the point had been raised for the first time!

As the Third Circuit opinion indicates, the fifty-eight day claim was previously before the court. Petitioner raised it in his petition for rehearing from the earlier Third Circuit decision that had upheld the Government's appeal from the District Court order releasing petitioner. The events on which the District Court order were based of course preceded the order; the events involved in the fifty-eight day claim all came subsequent to the order. Obviously, therefore, the latter events were not properly an issue on appeal in that proceeding. However, after the Court of Appeals decision to reverse the District Court was announced, petitioner called the attention of the Circuit Court to the fifty-eight day claim *only to establish that reversal was a futile action.* This was done in the petition for rehearing. The Court of Appeals did not grant a

rehearing and the judgment of reversal was allowed to stand.[3]

Petitioner applied to this Court for certiorari from that decision, but, since the fifty-eight day claim was in no proper sense a part of the decision, no mention was made of it here in this Court.

Notwithstanding the unusual and limited way in which the matter was presented to the Third Court, and notwithstanding that that Court never had the matter fully briefed and argued and never wrote an opinion on the subject, the refusal of the Third Circuit to grant rehearing was the prime basis on which petitioner's claim was rejected by the court below. Thus, this passage from the opinion of the Court:

> "He raised the same point for the first time under Part II of his petition for rehearing after our Opinion of December 9, 1959. The contention was decided against him when we denied rehearing. Nothing has been added since then to make us change our ruling." (Appendix A, *infra*, p. 24)

It should be noted that the panel deciding the case below was completely different from the panel that rendered the 1959 decision. No single judge sat on both panels.

The granting or refusing of rehearing is a discretionary act. Denial of the petition for rehearing is not inconsistent with the acceptance of petitioner's claim, the Court being satisfied that an alternative—and perhaps

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3. The decision of the court below, denying petitioner credit for the 58 days between his discharge by the District Court for the Eastern District of Pennsylvania, is in direct conflict with the decisions of the Court of Appeals for the District of Columbia, *Harris v. Lang*, 27 App. D. C. 84 (1906), of the Court of Appeals for the Tenth Circuit, *White v. Pearlman*, 42 F. 2d 788 (C. A. 10, 1930), and of the Court of Appeals for the Second Circuit, *United States v. Greenhaus*, 89 F. 2d 634 (C. A. 2, 1937). It is also contrary to the provisions of 18 U. S. C. § 3568.

better remedy existed in a new application for habeas corpus. It is impossible to say that, because rehearing was denied, petitioner's claim was rejected on the merits.

In any event, it is obvious that the nature of the consideration, even at this stage of the proceedings does not meet the minimum standard of full and rounded analysis that is essential for any bar through a rule of finality, as this Court held in *Sanders v. United States, supra.*

Despite the obvious weaknesses of this decision, if that is the proper word, the court below rested its judgment squarely on the earlier denial of rehearing.[4]

The Third Circuit decision likewise rests denial of petitioner's claim for twenty-four days of actual restraint in 1957 on grounds of *res judicata*. The court said:

> "The question of the twenty-four days was raised, although not as clearly and specifically as on this appeal, in Part I of his petition for rehearing on January 7, 1960. The denial of that petition by this Court precludes this panel from ruling in appellant's favor." (Appendix A, *infra*, p. 25).

This was the entire discussion of the first part of petitioner's claim, a flat holding by the Court that it was precluded from even considering the merits. Again the Court was interpreting blindly the obscure meaning of a denial of a petition for rehearing three years before by an entirely different panel of judges.

Finally, on the third claim, for thirty two days, the court below finds the 1959 decision controlling. In this instance, however, the court was strangely not content to cite the authority of the prior decision, but went on to make unfounded assertions of fact concerning the harm done to petitioner. It is not amiss to point out here that the un-

4. The court below also noted that the Ninth Circuit had ruled against petitioner on this contention, although this was mentioned only in passing.

resolved issues of fact on all aspects of petitioner's claim, discussed in the preceding section, make it especially vital not to employ *res judicata* precepts.

On the face of the Third Circuit opinion, it is manifest that the court below was not following the principles formulated by this Court in the subsequent major opinion in *Sanders v. United States*. Petitioner submits, therefore, that, as to this question, the most appropriate course is to reverse and remand the case to the Third Circuit for reconsideration in light of this Court's comprehensive opinion in *Sanders*. While that case arose under 28 U. S. C. § 2255, and the present proceeding is the application of a federal prisoner for writ of habeas corpus under § 2241, the Court made it abundantly clear in *Sanders* that the principles therein stated were applicable to both forms of proceeding. Indeed, the analysis of the problem under § 2255 proceeded from the more fundamental precepts in the law of habeas corpus.

Had this present petition for writ of certiorari been pending when *Sanders* was decided, the settled practice of this Court would have been the remand for reconsideration as is suggested here. Petitioner cannot at this stage reopen the proceedings in the Court of Appeals without an order from this Court. Accordingly, the summary reversal for reconsideration in light of *Sanders* is the most feasible and desirable course.

CONCLUSION.

Petitioner has raised two questions, both of which suggest reversal by this Court of the decision below without plenary consideration: on the first point, the necessity for a hearing and determination on sworn evidence of the unresolved and disputed issues of fact, and on the second, the necessity for the courts below to reconsider their decisions in light of this Court's later comprehensive

opinion in *Sanders v. United States*, *supra*. It is respectfully submitted that the petition for writ of certiorari should be granted, the judgment below reversed, and the cause remanded for further proceedings as this Court shall direct.

Respectfully submitted,

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June 1963

APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,987

UNITED STATES OF AMERICA EX REL. L. B. BINION,
Appellant,

v.

JAMES V. RYAN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 8, 1962.

Before GANEY and SMITH, *Circuit Judges*, and AUGELLI, *District Judge*.

OPINION OF THE COURT

(Filed February 18, 1963)

By GANEY, *Circuit Judge*.

On December 14, 1953, in the District Court for the Western District of Texas, the appellant herein entered a plea of guilty to two indictments charging income tax evasion for the years 1947 and 1948. The court sentenced him to three concurrent terms of five years each, to be followed by probation for three years and imposed a fine of $20,000.

The appellant began serving his sentences on December 14, 1953. In August, 1956, the appellant filed a motion

under 28 U. S. C. § 2255, to correct the Texas sentences alleging that they were excessive. This motion was denied by the District Court and on appeal to the Court of Appeals for the Fifth Circuit, the Court deferred termination of appellant's case pending a similar action before the Supreme Court of the United States. On March 11, 1957, the Supreme Court ordered appellant's release on bail which was granted by the District Court for the Western District of Texas on March 19, 1957. On October 14, 1957, after the Court of Appeals for the Fifth Circuit had affirmed the District Court's denial of appellant's motion to correct sentence, the Supreme Court denied certiorari. 355 U. S. 834.

On October 16, 1957, the appellant surrendered to the United States Marshal at Philadelphia, Pennsylvania, although he did not reside there, and on the same day filed a petition for writ of habeas corpus in the Eastern District of Pennsylvania, where he was released on bail. It must be here noted that upon his release on bail on March 19, 1957, he reported to his probation officer once a week until September 3, 1957, when the five year probationary period terminated, and on September 13, 1957, an order to that effect was filed by the District Court. The probation officer, nevertheless, instructed the appellant to report weekly pending clarification of his status until the United States Board of Parole advised the probation officer that there was no requirement that he report to him, and the appellant was advised to this effect on October 23, 1957, and did not report thereafter.

On December 22, 1958, the District Court for the Eastern District of Pennsylvania filed an order discharging appellant from custody. On December 9, 1959, this Court reversed the order of the District Court holding that the appellant was not entitled to credit on his sentence for the period he was on probation from March 19, 1957, until September 3, 1957, but was entitled to credit for the period from September 3, 1957, to October 23, 1957, or fifty days,

the period he reported, although he was no longer on probation.

This Court also found that at the time of the appellant's release on bond on March 19, 1957, he had three months and twenty days remaining to be served on the Texas sentence in order to be eligible for mandatory release (with which appellant in his brief agrees) and, therefore, giving him credit for the fifty days above, there remained a period of fifty eight days to be served under the Texas sentence. *United States ex rel. Binion v. O'Brien*, 273 F. 2d 495. Rehearing was denied on January 28, 1960, and his petition for writ of certiorari was denied on June 6, 1960. 363 U. S. 812.

On June 10, 1960, at Las Vegas, before our mandate had issued, appellant attempted to surrender himself to the United States Marshal for the District of Nevada, who refused to accept him without a court order. On June 13, this Court issued its mandate, and on July 5, the District Court for the Eastern District of Pennsylvania ordered appellant remanded to the custody of the Attorney General for completion of the 1952 sentences. He surrendered himself to the marshal on July 12. On the same day he was released on bail by the District Court for the District of Nevada in a habeas corpus proceeding. On November 9, that Court ordered the writ discharged and remanded appellant to the custody of the marshal. He immediately noted an appeal and was continued on bail. On June 26, 1961, the United States Court of Appeals for the Ninth Circuit affirmed the action of the lower Court. *United States ex rel. Binion v. United States Marshal for the District of Nevada*, 292 F. 2d 494. Rehearing was denied on August 4, and certiorari was also denied on November 20, 1961. 368 U. S. 919.

On November 21, 1961, again before the mandate of the Court of Appeals had been handed down, appellant presented himself to appellee, the United States Marshal for the Eastern District of Pennsylvania, and announced that

he was surrendering pursuant to the order of July 5, 1960. On the same day that he surrendered, he filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Pennsylvania, seeking to have that Court declare that his 1953 confinement sentences had expired and that he was entitled to be released. The District Court immediately permitted him to be freed on bail. On December 22, 1961, that Court dismissed the petition (201 F. Supp. 802); revoked bail as of January 3, 1962, and directed appellant to surrender himself to appellee on January 3, 1962, to be remanded to the custody of the Attorney General to complete service of the 1953 sentences. His present appeal is from the order dismissing his petition for writ of habeas corpus. He is presently at large on bail.

Appellant's main contention is that he should be given credit on the remaining confinement portion of his 1953 sentences, to the extent necessary, for the time elapsing between his discharge on a writ of habeas corpus by the District Court for the Eastern District of Pennsylvania, on December 22, 1958, and the time he offered to surrender himself to the marshal in Las Vegas on June 10, 1960.[1] He raised the same point for the first time under Part II of his petition for rehearing after our Opinion of December 9, 1959. The contention was decided against him when we denied rehearing. Nothing has been added since then to make us change our ruling. The Court of Appeals for the Ninth Circuit has also ruled that he is not entitled to receive any credit upon the 1953 sentences for that period of time. *United States ex rel. Binion v. United States Marshal for the District of Nevada*, supra, 292 F. 2d, at p. 497.

In the alternative, appellant wants us to declare that he is entitled to a credit toward the confinement portion

1. By sheer coincidence the number of days elapsing between December 22, 1958, the date of his unconditional release, and February 19, 1959, the date the Government noted its appeal to this Court, is fifty-eight, the same number that still remains to be served by him on the confinement portion of the 1953 sentences. Although the appellant points this out in his brief, the date of the Government's appeal is, in itself, of no significance.

of his 1953 sentences for (1) the *twenty-four days* on which he actually reported between March 17, and September 3, 1957, "by personal contact not less than once a week" to the probation officer in Nevada on his 1952 probation sentence, over and above the legal reporting requirement of that sentence, and (2) the *thirty-two days* elapsing between the date he offered to surrender himself on June 10, and the date he was actually taken into custody on July 12, 1960. We cannot comply with his request.

The question of the twenty-four days was raised, although not as clearly and specifically as on this appeal, in Part I of his petition for rehearing on January 7, 1960. The denial of that petition by this Court precludes this panel from ruling in appellant's favor.

As for the thirty-two days, the Court of Appeals for the Ninth Circuit has decided against him. 262 F. 2d at pp. 497-498. Our previous Opinion requires us to agree with that ruling. We might add here that he was not harmed by the marshal's refusal to take him into custody on June 10, 1960. It is apparent that he did not surrender for the purpose of electing to serve the remaining portion of his sentences. He gave himself up so that he could establish a basis for the filing of a petition for a writ of habeas corpus and an application for bail in the District Court for the District of Nevada. This is exactly what he did as soon as he was taken into custody on July 12, 1960, and he was immediately released on bail. If he had the right to surrender to the marshal prior to the time the order of the District Court issued pursuant to the mandate of this Court,[2] he should have first sought a court order to compel

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2. See Rule 38(a)(2) of the Federal Rules of Criminal Procedure, which provides: "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail." He is assumed, without more, to have "elected" to serve if he does not elect not to commence service.

Section 7H.02 (revised June 9, 1958) of the United States Marshals Manual, issued by the Department of Justice, states: "The

the marshal to accept him, rather than bring a proceeding, long after the refusal to accept him, for a judicial declaration that he is entitled to a credit on his sentences for a period of time when he was at liberty. *Bueno v. Keeton*, 287 F. 2d 534 (C. A. 2, 1961), cert. denied, 368 U. S. 846.

The order of the District Court will be affirmed.

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sentence begins on the date of imposition (assuming the prisoner is in custody for service of sentence) and becomes inoperative at the close of the day on which the defendant elects not to commence service of sentence or is released on bail. A sentence so stayed will not resume running until the election not to serve is withdrawn or until the judgment of the lower court is affirmed, the mandate of the higher court filed in the district court, and the prisoner is in custody for service of sentence . . . ."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,987

UNITED STATES OF AMERICA, EX REL. J. B. BINION,
Appellant

v.

JAMES V. RYAN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: GANEY and SMITH, *Circuit Judges*, and ANCELL, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of December 22, 1961 of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

February 18, 1963

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,987

UNITED STATES OF AMERICA, EX REL. L. B. BINION,
Appellant
v.
JAMES V. RYAN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUR PETITION FOR REHEARING

Present: GANEY and SMITH, *Circuit Judges*, and AUGELLI, *District Judge*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT

J. CULLEN GANEY,
Circuit Judge

Dated: March 18, 1963.

APPENDIX C.

United States Constitution, Fifth Amendment:

No Person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Title 28, U. S. C.:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

§ 2243. Issuance of writ; return; hearing; decision

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Title 18, U. S. C.:

§ 3568. Effective date of sentence

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

Federal Rules of Criminal Procedure:

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

* * *

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

* * *

Rule 62. Stay of Proceedings to Enforce Judgment

* * *

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay

* * *

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

Rules of the United States Supreme Court:

* * *

Rule 25. Order Granting or Denying Certiorari.

* * *

2. No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of

certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or a justice thereof.

Rules of the United States Court of Appeals for the Third Circuit:

Rule 15. Custody of Prisoners Pending Appeal in Habeas Corpus Proceedings.

* * *

(3) If Prisoner Discharged. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceedings; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

(4) Upon Review in Supreme Court. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in this court but also the further possible review in the Supreme Court;